No. 11749.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. A. JOSE, OLGA JOSE, CORDA LANCASTER, WILLIAM LANCASTER, ELLA JACKMAN, JOHN I. JACKMAN, GEORGE T. RENAKER, JOHN S. PATTEN, HARRIS H. HAMMOND, A. L. BERGERE, J. C. BERGERE, WILLARD WALLACE, EDNA M. WALLACE, JAMES P. DELANEY, MARY J. DELANEY and IRVIN S. BARTHEL,

Appellants,

vs.

HATTIE M. HOUCK, as Administrator of the Estate of Stanley B. Houck, Deceased, RUBY E. EDLING, WILNA N. SHERARD, HATTIE M. HOUCK, RUTH M. HEBBARD, MINNIE N. McKENZIE, HOWARD H. McKENZIE, VERONICA K. GHOSTLEY and H. W. LEWIS,

Appellees.

Reply Brief of J. A. Jose, Olga Jose, Corda Lancaster, William Lancaster, Ella Jackman, John I. Jackman, George T. Renaker and John S. Patten, Appellants.

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TABLE OF AUTHORITIES CITED

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Appellees.

APPELLANTS' REPLY BRIEF.

Statement.

The appellees in their reply brief have failed to answer the arguments presented in our opening brief.

We have not, in this reply brief, attempted to analyze the cases cited by the appellees in their brief for the reason that all of the cases cited by appellees follow the rules

set forth in the cases cited in our opening brief, that is to say,

1. There must be a discovery before there can be a valid location.
2. Discovery must be proven by the plaintiffs in order to prove that a valid location exists.
3. That the filing of location notices is of no avail unless preceded by discovery, and that rights intervening prior to discovery take precedence over the mere filing of notices of location.

The appellees contend that the question of discovery is not involved in this action for the following reasons:

That in their complaint [Record, p. 4, par. 6 of the complaint] they pleaded that the lands contained a valuable deposit of Montmorillonite clay and that the appellants in their answers admitted such fact. The appellees, however, overlook the fact that the appellants denied that appellees were the owners or entitled to the possession of the mining claims there described and that the issue in the case was which of the three sets of claimants made valid locations, and that in order to make a valid location there had to be a prior discovery.

The appellees next assert that at the opening of the trial there was a stipulation entered into as follows [Record, p. 63]:

> "I think it can be stipulated, your Honor, that the value of mineral deposits on the land just set forth is greatly in excess of the jurisdiction of the court. In other words, it is greatly in excess of the sum of $3,000.00."

This stipulation had nothing whatever to do with the question of discovery. It was merely eliminating a part of plaintiffs' proof with respect to jurisdictional amount. The issue in the case remained, who owned the mining claims by reason of compliance with the statutes of the United States and the statutes of the State of California?

The appellees next contend that if the question of discovery is involved, the evidence shows that such discovery was made by the appellees prior to the location of the property on September 7, 1945, and in this connection they state that the witness Lewis made such discovery in the year 1942, and the argument is based upon the following testimony [Record, p. 143]:

> "Q. You stated some time ago, I believe, that you were on this property in 1942. A. That is right.
>
> Q. Did you personally at that time do any digging on the property? A. No, I didn't do any digging. I picked up some samples and brought them in and had them analyzed.
>
> Q. Where did you pick the samples from? I mean, from this land described in Plaintiffs' Exhibit '1'? A. Yes.
>
> Q. Some material that you picked up from the ground, or was there a hole in the ground? A. There was a side cliff.
>
> Q. An open face cliff? A. An open face cliff, yes.
>
> Q. Did that material contain Montmorillonite clay that we have referred to in the stipulation on the property? A. According to the analysis by Smith-Emory."

This does not constitute a discovery. First, there is no testimony upon which one of the claims involved in this action that the samples were found on. Second, there is no showing that there was exposed on the side of the cliff a sufficient quantity of Montmorillonite clay to constitute a discovery. Third, this was done when the land was withdrawn from entry; and fourth, the evidence as pointed out in our opening brief shows that the appellees were on this land upon September 6 and September 7, 1945, and that the only thing that they did was to post the land. They made no attempt whatever to ascertain whether or not there was Montmorillonite clay on any or all of the claims. Their testimony is conclusive that they made this attempt commencing in the last week in November, 1945.

Discovery is always an issue where conflicting rights are asserted to mining locations for the very basis of the right, its inception, is the discovery, and in order to prove title, discovery must be proved. It cannot be stipulated to, for the land belongs to the United States, and the United States permits the right to come into existence only upon proof of discovery.

The appellees admit that there is no proof in the record of the amount of work done upon each of the claims. This is fatal to their right to recover. The burden of proving compliance, not only with the statutes of the United States, but with the statutes of the State of California, was upon the appellees, in order to show their title. Failure to make such proof in turn constituted a failure of title, and it is of no avail for the appellees to say that the appellants should have made this proof for them. Not only was there a failure to prove the amount of work

done on any particular claim, but there was a failure to prove a sufficient expenditure to comply with the law. The appellees acknowledge that the time book, which the witness Lewis testified contained a complete record of all of the moneys expended in the performance of the work, shows an expenditure for work done on the property in compliance with Section 2304 and 2305 of the Public Resources Code of California in the sum of $2085.90. The minimum requirement for the 2560 acres here involved under Section 2304 is the sum of $2560.00. The requirement in addition to this is compliance with the work required by Section 2304.

Section 2305 provides:

> *"Additional Work on Certain Placer Claims. Nature and Extent of Work. Construction of Section.* Within 90 days after the date of location of any placer mining claim hereafter located, containing more than 20 acres, the locator or locators thereof shall perform at least one dollar's worth of work for each acre included in the claim. This work may all be done at one place on the claim if so desired, and shall be actual mining development work, exclusive of cabins, buildings or other surface structures. Nothing in this section shall be construed as a modification of the requirements of Section 2304 of this code."

Section 2304:

> *"Improvement of Claims. Excavation of Shaft, Tunnel or Open Cut.* (a) (Discovery shaft, tunnel, adit or open cut.) Within 90 days after the date of location of any lode mining or placer claim hereafter located, the locator or locators thereof shall sink a discovery shaft upon the claim to a depth of at least 10 feet from the lowest part of the rim of

> the shaft at the surface, or shall drive a tunnel, adit or open cut upon the claim to at least 10 feet below the surface. (b) (Open cut on placer claim.) In lieu of the discovery work required by paragraph (a) of this section, the locator of a placer mining claim may, within 90 days after the date of location, excavate an open cut upon the claim, removing from the cut not less than 7 cubic yards of material."

We directed attention in our opening brief to the fact that subdivision (b) of Section 2304 dealt exclusively with a placer claim filed upon by an individual locator, and that for a placer claim located pursuant to Section 2305 of the Public Resources Code, it was necessary to comply with subdivision (a) and sink a discovery shaft to at least 10 feet from the lowest part of the rim of the shaft at the surface or to drive a tunnel, adit or open cut to at least 10 feet below the surface. Compliance with subdivision (a) was had only by the Jose appellants. The appellees and the appellants Hammond made no attempt to comply with this subdivision of Section 2304 of the Public Resources Code of California. That this is the proper construction of the sections will be readily seen from a reading of Section 2306 and Section 2306.5 of the Public Resources Code. 2306.5 is a remedial section, as follows:

> *"Alternative Work Requirements for Location or Relocation of Certain Placer Claims.* As to any placer mining claim which has been otherwise validly located or relocated since the enactment of Sections 1426-da and 1426-dc of the Civil Code, and as to which claim the locator or relocator has not performed the work thereon required by those sections, for the reason that literal compliance therewith was not feasible, the locator or relocator may perfect his

claim by excavating an open cut thereon and removing from the cut not less than 7 cubic yards of material, provided that such work shall be completed within 90 days after the effective date of this section."

Section 1426-da of the Civil Code of California is now Section 2304 of the Public Resources Code above set forth in full.

Section 1426-dc of the Civil Code of California is now Section 2306 of the Public Resources Code of California and deals exclusively with the relocation of claims:

> *"Relocation of Claims. Improvements Required. Options.* The relocation of any lode or placer mining location which is subject to relocation shall be made as an original locaton is required to be made, except the relocator may either sink a new shaft upon the ground relocated to a depth of at least 10 feet from the lowest part of the rim of the shaft at the surface or drive a new tunnel, adit or open cut upon the ground to at least 10 feet below the surface; or the relocator may sink the original discovery shaft 10 feet deeper than it is at the time of relocation; or drive the original tunnel, adit or open cut upon the claim 10 feet further; or in the case of placer mining claims, the relocator may either excavate a new open cut upon the claim, removing from the cut not less than 7 cubic yards of material, or remove from the original open cut not less than 7 additional cubic yards of material."

It will be noted from the above that when the remedial statute, Section 2306.5, was enacted, permitting the removal of 7 cubic yards of material from a placer mining claim, as provided for by subdivision (b) of Section 2304

of the Public Resources Code, which subdivision (b) was added to the law at the same time, that it was not made applicable to a placer mining claim containing more than 20 acres, and that it was not made applicable to any placer mining claim that had been located pursuant to the terms of Section 2305 of the Public Resources Code, which was then Section 1426-db of the Civil Code, showing that the Legislature intended that with respect to placer mining claims containing more than 20 acres, subdivision (a) not subdivision (b) of Section 2304 should be applicable.

The appellees in their brief assert that they complied with subdivision (b) by removing 7 cubic yards from each 160 acre claim. How they arrive at this conclusion, it is difficult to understand, for their testimony was that they spent slightly in excess of $2600.00. The records that they offered showed that they actually spent $2085.90, not enough to comply with Section 2305, much less meet the requirements of subdivision (b) of Section 2304, and far less than would be required to meet the requirements contained in subdivision (a) of Section 2304.

The appellees with respect to the Jose appellants make the erroneous statement on page 8 of their brief,

> "As to the development work by appellants Jose, *et al.*, they paid out $1367.00 for the development work they performed, approximately $700.00 of which was paid to Mr. Jose, one of the appellants, the remainder being paid for operating the bulldozer."

We cannot believe that the appellees, in making this statement, are serious. The appellants Jose produced as a witness, Charles H. Bratton [Record, pp. 390-398, incl.], and proved by this witness that on each one of the 16 claims involved they performed in excess of $160.00 worth of work on each claim. By the witness, Joseph F. Golden [Tr. pp. 371-389, incl.], the Jose appellants proved the location of the work on each claim, the size of the holes dug by them, the number of cubic yards of earth removed, and in addition to the above, proved by the witness Lancaster that in compliance with Section 2304 of the Public Resources Code of the State of California, they had expended beyond the requirements of Section 2305 and in compliance with the requirements of Section 2304 of the Public Resources Code the sum of $1367.00. The Jose appellants proved that in the performance of the work, which work was actually done, they had expended the sum of $3953.50, not $1367.00.

The appellees have made no attempt in their answer to answer the argument contained in appellants Jose's opening brief. They have quoted a portion of the testimony of Mr. Lancaster with respect to the location of the claims, and without authority assert that the method used by the Jose appellants does not comply with the law.

Section 2303 of the Public Resources Code, in dealing with surveyed lands, provides:

> "Where the United States survey has been extended over the area embraced in the location, however, the claim may be taken by legal subdivision and no other

references than those of such survey shall be required, and the boundaries of a claim so located and described need not be staked or monumented. The description by legal subdivision shall be deemed the equivalent of marking."

In the case at bar, the Jose appellants complied with this section.

We respectfully submit that the judgment appealed from should be reversed.

Respectfully submitted,

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Attorneys for Jose Appellants.